

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-1329

To be argued by
MICHAEL Q. CAREY

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 75-1329

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANCISCO ADRIANO ARMEDO-SARMIENTO, a/k/a
Eduardo Sanchez, a/k/a Pacho El Mono, a/k/a Elkin,
a/k/a Francisco Vele and LIBARDO GILL, a/k/a
Ramiro Estrada,

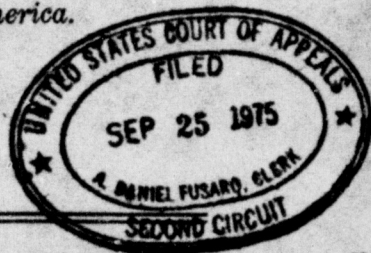
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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*United States Attorney for the
Southern District of New York,
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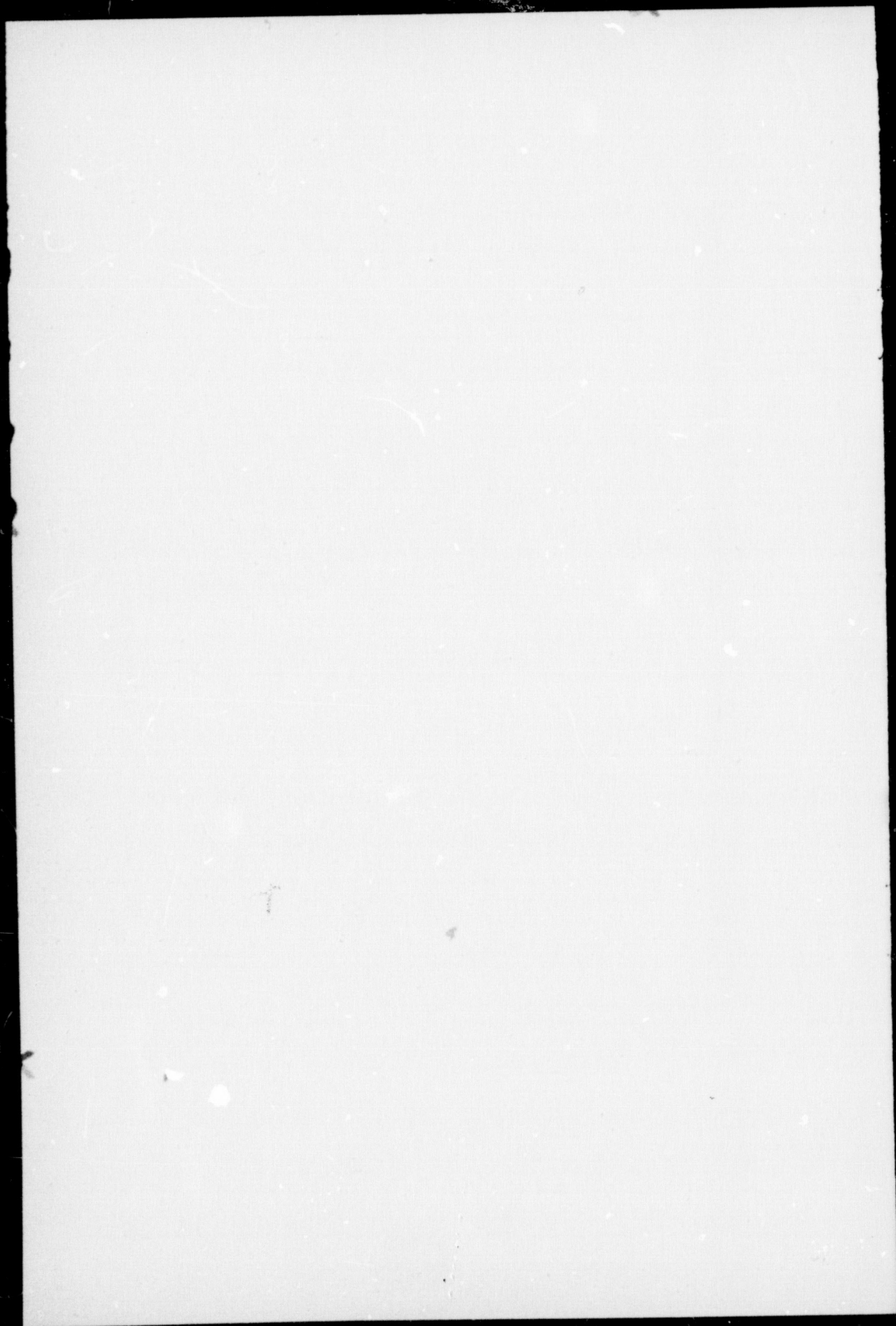


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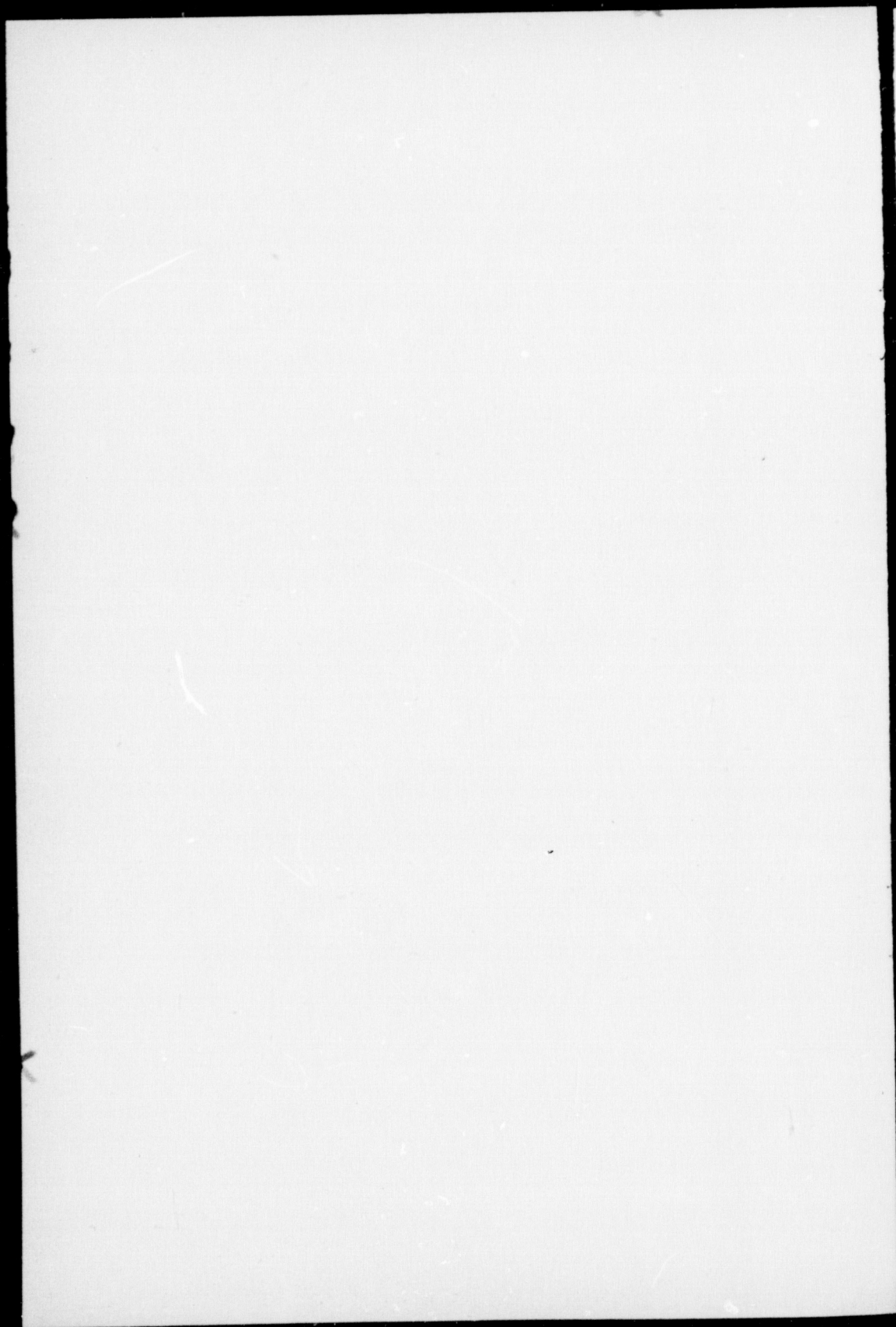
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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1329

UNITED STATES OF AMERICA,

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—V.—

FRANCISCO ADRIANO ARMEDO-SARMIENTO, a/k/a Eduardo Sanchez, a/k/a Pacho El Mono, a/k/a Elkin, a/k/a Francisco Velez and LIBARDO GILL, a/k/a Ramiro Estrada,

Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Francisco Adriano Armedo-Sarmiento, a/k/a Eduardo Sanchez, a/k/a Pacho El Mono, a/k/a Elkin, a/k/a Francisco Velez (hereinafter "Francisco Armedo") and Libardo Gill, a/k/a Ramiro Estrade (hereinafter "Ramiro Estrada") appeal from a Memorandum Decision and Order filed on August 29, 1975 in the United States District Court for the Southern District of New York by the Honorable John M. Cannella, United States District Judge, granting the Government's motion to disqualify the law firm of Kassner & Detsky, P.C., as attorneys for appellants on the ground of a conflict of interest.

Indictment S75 Cr. 429 was filed April 30, 1975 charging thirty-eight defendants in two counts with conspiracy to import and distribute and possess with the intent to distribute cocaine (Count One) and marijuana (Count Two), in violation of Title 21, United States Code, Sections 846 and 963, and two defendants in Count Three with carrying and using firearms during the commission of and to commit a felony, in violation of Title 18, United States Code, Section 924(c). Francisco Armedo and Ramiro Estrada are charged only in Counts One and Two.*

On May 12, 1975, the Government moved to disqualify the firm of Kassner & Detsky on the ground, *inter alia*, that a conflict of interest existed in its representation of defendants Francisco Armedo and Ramiro Estrada and its prior representation of prospective Government witnesses.

After a hearing on May 12, 1975, on August 29, 1975, Judge Cannella granted the Government's motion and disqualified Kassner & Detsky in the Memorandum Decision and Order from which the defendants appeal.

* Ramiro Estrada was arrested in New York on September 30, 1974 and is presently serving a sentence of one year to life on a plea of guilty to a charge of violating the narcotics laws of the State of New York.

Francisco Armedo was arrested by New York and Federal authorities on September 3, 1974 and is presently incarcerated by the State of New York in lieu of \$2,500,000 bail awaiting trial on charges of violating the narcotics laws of the State of New York.

A detainer has been filed with the State of New York against them regarding the charges in this case.

Of the thirty-eight defendants, only fourteen are not fugitives. Only three defendants are incarcerated awaiting trial in lieu of bail set on the charges in this indictment.

Statement of Facts

Indictment S75 Cr. 429, filed April 30, 1975, superseded indictments 74 Cr. 817 (JMC), 74 Cr. 939 (MP) and 74 Cr. 1128 (JMC) which were filed August 19, 1974, October 4, 1974 and November 27, 1974, respectively.

On March 21, 1975, before superseding indictment S75 Cr. 429 was filed, the Government moved in Indictment 74 Cr. 1128, before the Honorable John M. Cannella, United States District Judge, to disqualify the law firm of Kassner & Detsky as counsel for Edgar Restrepo Botero, a/k/a Omar Hernandez, a/k/a El Sobrino, a/k/a Edgar (hereinafter "Edgar Restrepo").* The Government argued that a conflict of interest existed between Kassner & Detsky's representation of Edgar Restrepo on indictment 74 Cr. 1128 and their prior representation of four prospective Government witnesses. On the same day, the Court held a hearing at which two of the Government's prospective witnesses, Carmen Caban and Renee Rondinell, on advice of separate counsel, refused to waive the attorney-client privilege each had with Kassner & Detsky. (19A, 22-23A)**

At the hearing, Kassner & Detsky did not oppose the Government's motion, indeed they conceded that a conflict of interest existed (9A), and Judge Cannella ordered that Kassner & Detsky were disqualified (27A).***

On April 30, 1975, the Grand Jury filed superseding indictment S75 Cr. 429. The indictment named Edgar Restrepo, Francisco Armedo and Ramiro Estrada and

* Edgar Restrepo was indicted as Omar Hernandez, a/k/a Edgar in indictment 74 Cr. 1128.

** Citations followed by A refer to pages of the Joint Appendix.

*** Edgar Restrepo is currently represented by court-appointed counsel.

thirty-five others as defendants, and Blanca Ruth Velasquez, a/k/a Carmen Caban, a/k/a Carmen Colon (hereinafter "Carmen Caban") and Renee Rondinell a/k/a Rita Ramos (hereinafter "Renee Rondinell"), as unindicted co-conspirators, in two counts, each of which charged a conspiracy to import and distribute cocaine (Count One) and marihuana (Count Two) from on or about January 1, 1972 to April 30, 1975. Overt Acts 2 and 5 of the indictment, *inter alia*, identified Carmen Caban and Renee Rondinell, respectively, as committing overt acts in furtherance of the conspiracy.

On May 12, 1975, defendants Francisco Armedo and Ramiro Estrada were arraigned on indictment S75 Cr. 429, pleaded not guilty (May 12, 1975 transcript at 10, 44) and the Government moved to disqualify Kassner & Detsky as counsel for any defendant in this case (May 12, 1975 transcript at 57; 39A-41A). Counsel for the defendants and the Government argued their respective positions and Judge Cannella reserved decision on the motion (61A).

On May 22, 1975, Judge Cannella directed the Government and Kassner & Detsky to file, by June 2, 1975, legal memoranda with respect to the Government's motion to disqualify Kassner & Detsky. In defendants' memorandum of law in opposition to the Government's motion, Kassner & Detsky stated that they represented Carmen Caban and Renee Rondinell as late as December of 1973, nearly two years after the date charged in the indictment as the approximate start of the conspiracy.

Kassner & Detsky represented Carmen Caban in New York State with respect to charges of violating the narcotics laws of the State of New York from shortly after her arrest on July 26, 1973 until approximately three weeks prior to her trial which commenced on or about

February 28, 1974 (Affidavit of Michael Q. Carey, sworn to August 28, 1975, ¶¶ 4 and 9). At that time, Kassner & Detsky withdrew from their representation of Carmen Caban at the Court's request because Renee Rondinell, a state witness against Carmen Caban whom Kassner & Detsky had represented in about four criminal matters, said, in effect, she did not want to waive her attorney-client relationship (Affidavit of Seymour S. Detsky, sworn to August 25, 1975, at 2).

On August 29, 1975, Judge Cannella filed a Memorandum Decision and Order ("Order") granting the Government's motion to disqualify Kassner & Detsky on the ground that their prior representation of Carmen Caban constituted a conflict of interest.* In reaching his decision, Judge Cannella found that the firm of Kassner & Detsky was in possession of a substantial amount of privileged information regarding Carmen Caban and Renee Rondinell acquired as a result of its representation of them on charges of possessing and selling controlled substances during the period of the alleged existence of the alleged conspiracy and that Carmen Caban and Renee Rondinell had refused to waive their attorney-client relationship (Order at 5, [97A, 103A]). Moreover, the Court found on the basis of an *in camera* affidavit submitted by the Government that Carmen Caban was an important adverse witness regarding Francisco Arredo and Ramiro Estrada (Order at 13).

* The Court decided the Government's motion on only one of three grounds on which the Government had moved. The Government had also moved to disqualify Kassner & Detsky on the grounds that Francisco Arredo and Ramiro Estrada had potentially conflicting interests with each other and that Francisco Arredo and Ramiro Estrada had interests which potentially conflicted with those of Edgar Restrepo, who had previously been represented by Kassner & Detsky.

The Court disqualified Kassner & Detsky on the ground that it previously represented Carmen Caban in a substantially related criminal proceeding and that Carmen Caban was an important adverse witness who refused to waive her attorney-client privilege (Order at 11, 15).

Kassner & Detsky filed a Notice of Appeal, dated September 3, 1975, from Judge Cannella's decision and moved for an order expediting the appeal and staying all proceedings. On September 8, 1975, this Court granted the motion for a stay and an expedited appeal.

ARGUMENT

POINT I

The Court of Appeals has jurisdiction to hear the appeal from the order disqualifying defense counsel at this stage of the proceedings.

Under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), there exists a small class of decisions from which appeal may be taken, without certification, before final judgment. These decisions are those:

“... which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.” 337 U.S. at 546-47.

Orders disqualifying counsel repeatedly have been held to fall within the *Cohen* doctrine and are thus appealable at this time under 28 U.S.C. § 1291. *Hull v. Celanese*

Corp., 513 F.2d 568 (2d Cir. 1975); *General Motors Corp. v. City of New York*, 501 F.2d 639 (2d Cir. 1974); *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 496 F.2d 800 (2d Cir. 1974) (en banc); *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975).

POINT II

Defendants' Sixth Amendment rights have not been violated.

Defendants Francisco Armedo and Ramiro Estrada argue that Judge Cannella's order disqualifying Kassner & Detsky as their counsel has violated their Sixth Amendment right to counsel by denying them counsel of their choice. Appellants' claim has no merit.

Appellants' right under the Sixth Amendment to retain counsel of their choice is not an absolute right, *United States v. Tortora*, 464 F.2d 1202, 1210 (2d Cir.), *cert. denied*, 409 U.S. 1063 (1972); *United States v. Di Stefano*, 464 F.2d 845, 846 n.1 (2d Cir. 1972); *United States v. Kaufman*, 429 F.2d 240, 247 (2d Cir.), *cert. denied*, 400 U.S. 925 (1970); *United States ex rel. Baskerville v. Deegan*, 428 F.2d 714, 716 (2d Cir.), *cert. denied*, 400 U.S. 928 (1970); *United States v. Sheiner*, 410 F.2d 337, 342 (2d Cir.), *cert. denied*, 396 U.S. 825 (1969); *United States v. Bentvena*, 319 F.2d 916, 936 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963); *Ross v. Reda*, 510 F.2d 1172, 1173 (6th Cir. 1975); *United States v. Casey*, 480 F.2d 151, 152 (5th Cir.), *cert. denied*, 414 U.S. 1045 (1973); *United States v. Sexton*, 473 F.2d 512, 514 (5th Cir. 1973); *cf. Bedrosian v. Mintz*, 518 F.2d 396 (2d Cir. 1975), but one which must be balanced against both the interest of the prospective government witness in maintaining the confidentiality of her privileged communications to Kassner & Detsky, in what Judge Cannella found to be matters related to the issues to be tried and the public interest in maintaining

the highest standards of professional conduct and the scrupulous administration of justice. *Hull v. Celanese Corporation*, *supra*, 513 F.2d at 570-572; see *Emle Industries, Inc. v. Patentex, Inc.*, 478 F.2d 562, 564-65 (2d Cir. 1973). While the criminal cases dealing with the Sixth Amendment right to counsel of the defendant's own choice have not confronted the issue of disqualification on the ground of prior representation of a witness, those cases have nonetheless sustained the denial of the right to counsel of defendant's own choice on grounds, in most cases, far less substantial than the protection of the attorney-client privilege, a basis for disqualification unhesitatingly applied in the decisions of this Court in civil cases. However, in an analogous situation, this court not only sustained the denial of the right to counsel of the defendant's choice where the disqualification of the attorney was apparently granted to protect the attorney-client relationship, but acknowledged, by implication, that the District Court's exercise of its discretion in ordering disqualification is to be judged by the standards enunciated in civil cases, *United States v. Kaufman*, *supra*, 429 F.2d at 247.

Here, two prospective Government witnesses refused to waive their attorney-client relationship with Kassner & Detsky. Their refusal was quite clearly motivated by a desire to maintain the confidentiality of their earlier communications with the law firm as a result of which Kassner & Detsky received a substantial amount of privileged information (97A).*

Judge Cannella's finding that there was a danger that counsel might, even inadvertently, divulge a confidence of its former clients and that its promise not to do so was not enough (Order at 4, 101A)** has consistently been

* Appellants have not challenged this finding by Judge Cannella.

** The Court did not find, as appellants assert, that counsel would breach its obligation of confidentiality (Brief for Appellants at 10).

recognized in this Circuit as sufficient justification to disqualify counsel. See, e.g. *Hull v. Celanese Corporation*, *supra*, 513 F.2d at 571-72; *Emle Industries, Inc. v. Patentex, Inc.*, *supra*, 478 F.2d at 571. Moreover, disqualification on these grounds does not malign the legal profession (Brief for Appellants at 10). On the contrary, it serves to assure the public that the legal profession maintains the highest standards of professional conduct. "The semblance of unethical behavior by practitioners may well be as damaging to the public image as improper conduct itself." *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corporation*, — F.2d — (Dkt. No. 74-1104 (2d Cir., May 23, 1975) 3669, 3685-86.

Appellants argue that in deciding the motion to disqualify their counsel, the District Court should have accepted the proposition in *United States v. Jeffers*, — F.2d — (Nos. 74-1650, 74-1680, 7th Cir., July 30, 1975) that where the temptation to use confidential information to impeach a former client is not serious,* ". . . courts can generally rely on the sound discretion of members of the bar to treat privileged information with appropriate respect" (Slip op. at 11), and should not have emphasized the possibility that counsel might inadvertently disclose a confidence learned from its former clients (Brief for Appellants at 9-10). *Jeffers* is inapposite. Here the temptation to Kassner & Detsky to use confidential information is necessarily serious. In any event, it is plain from the opinions in this Circuit that the possible inadvertent use by former counsel of confidential information is in all cases itself a serious matter, *Hull v. Celanese Corporation*, *supra*, 515 F.2d at 571-72; *Emle Industries, Inc. v. Patentex, Inc.*, *supra*, 478 F.2d at 565, a possibility which the *Jeffers* court did not discuss. Finally, in *Jeffers*, the former clients did not, as they did here, unequivocally insist on the maintenance

* Appellants have only suggested, in an equivocal manner, that the temptation is not serious (Brief for Appellant at 11).

of the confidentiality of their privileged communications with their former attorney.

Moreover, Kassner & Detsky has conceded that a conflict exists in this case.* That conflict arises because it owes a duty of confidentiality to the Government's witnesses which may impair its ability to cross-examine them but also a duty to the Appellants to vigorously represent them. Given this conflict and the unchallenged finding of the District Court that Kassner & Detsky possesses a substantial quantity of privileged information which was obtained from the Government's prospective witnesses, the impropriety of its continued presence in this case is unmistakable. See *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corporation*, *supra*, — F.2d —, slip op. at 3684 (Adams, C.J., concurring). Such impropriety is no less obvious here than it was in *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corporation*, *supra*, because it occurs in the context of a criminal trial.

This case presents a question of balancing the appellants' Sixth Amendment right to the assistance of counsel of their choice, *United States v. Sheiner*, *supra*, 410 F.2d at 342, with the Government witnesses' Sixth Amendment

* Appellants state with reference to the return of the superseding indictment:

"The action of the government in taking what had once been a conflict free situation and *causing it to be otherwise* should not be permitted to abrogate appellants' right to counsel of their choice" (Brief for Appellants at 11) (emphasis added).

Moreover, despite its present claim that the conflict is the Government's fault, Kassner & Detsky conceded a conflict of interest existed in its representation of Edgar Restrepo, a defendant in indictment 74 Cr. 1128 and its prior representation of the prospective Government witnesses against him (9A). Indeed, it appears it also conceded the existence of such a conflict between its representation of Carmen Caban at her state trial and its prior representation of Renee Rondinell, a state witness against Caban (95A).

right to feel secure in the belief that their earlier privileged communications to Kassner & Detsky will not be disclosed.

Clearly, the witnesses' Sixth Amendment right must be given preference. Complete candor of the client is indispensable to the effective representation of the accused. *The Prosecution Function and the Defense Function*, The Defense Function, Introductory Note at 199 (American Bar Association, 1971). "It is to encourage candor and full disclosure that the obligation of confidentiality which surrounds the lawyer-client relation has been erected. The Canons of the American Bar Association reflect the ancient doctrine that a lawyer must preserve all confidences which relate to the representation of the accused." *Id.*, Commentary at 201 (footnote omitted). If an attorney were permitted to reveal such confidences, the usefulness and benefits to be derived from professional assistance would be destroyed. M. Freedman, *Lawyer's Ethics In An Adversary System* at 5 (Bobbs-Merrill, New York, 1975.) If Kassner & Detsky is not disqualified and its former clients are subject to cross-examination by it, the faith of both the former client and the public in the ability of a criminal defendant to maintain the confidentiality of privileged communications with counsel will be destroyed. Such a loss of faith will severely impair the ability of attorneys to gain the confidence of their clients, which is essential to the effective representation guaranteed criminal defendants under the Sixth Amendment. M. Freedman, *Lawyer's Ethics in an Adversary System*, *supra*, at 5, 8; *The Prosecution Function and the Defense Function*, *supra*, at 201.* On the other hand, if Kassner

* A limit on the cross-examination of its former clients by Kassner & Detsky is likely to have the same effect since a question would then always remain whether the attorneys represented their clients at this trial with the independent vigor expected of them.

& Detsky is disqualified, appellants' Sixth Amendment rights will not be violated. As noted earlier, the right to retain counsel of one's choice in a criminal matter does not confer the absolute right to retain counsel of one's first choice. Disqualification of Kassner & Detsky will not prevent appellants from retaining other counsel of their choice.* When the public's interest in maintaining the highest standards of professional conduct and the scrupulous administration of justice, *Hull v. Celanese Corporation*, *supra*, 513 F.2d at 570-572, is added to the above considerations, the balance unquestionably tips in favor of the disqualification of Kassner & Detsky. It is settled that in a civil case, a client's right to counsel of his choice must yield to considerations of ethics which run to the very integrity of our judicial process, *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corporation*, *supra*, — F.2d —, slip op. at 3681; *Hull v. Celanese Corporation*, *supra*, 513 F.2d at 572, and appellants have offered no reason why this rule should not be the same in a criminal matter. Indeed the viability of the Sixth Amendment right to assistance of counsel dictates that the rule be followed in criminal cases. See *United States v. Kaufman*, *supra*, 429 F.2d at 247. As this Court has said recently:

"This is, in short, one of those cases in which disqualification is a necessary and desirable remedy . . . to enforce the lawyer's duty of absolute fidelity and to guard against the danger of inadvertent use of confidential information . . . See *Ceramco, Inc. v. Lee Pharmaceuticals*, *supra*, 510 F.2d 268, 271 (2d Cir. 1975)." *Hull v. Celanese Corporation*, *supra*, 513 F.2d at 571.

* When appellants were informed of the Court's order disqualifying Kassner & Detsky, Ramiro Estrada expressed a desire to be represented by Murray Cutler, attorney for his wife in this matter (89A) and Francisco Armedo asked for sufficient time to retain another attorney (S1A). Neither defendant personally objected to the disqualification of Kassner & Detsky (88A-92A).

Appellants mistakenly rely on four cases which are inapposite to the issue on this appeal. In all four cases, *United States v. Garcia*, *supra*; *United States v. Jeffers*, *supra*; *United States v. Donatelli*, 484 F.2d 505, 507 (1st Cir. 1973) and *United States v. Alberti*, 470 F.2d 878 (2d Cir. 1972), *cert. denied*, 411 U.S. 919 (1973), the prospective Government witnesses who had previously been represented by defendant's counsel did not assert their claim of privilege. Indeed, in *United States v. Garcia*, the potential government witnesses expressly waived their privilege. Moreover, in all the above cases but *United States v. Garcia*, the issue was whether the convicted defendant had been denied his Sixth Amendment right to effective representation of counsel since his attorney had previously represented a government witness. Here, however, as Judge Cannella observed, the appellants' Sixth Amendment rights to effective representation free of conflict are not at issue since they have chosen to waive any conflict (106A).

Appellants argue that Judge Cannella abused his discretion in finding (104A) that Carmen Caban's testimony may in many ways implicate them and that she was an important adverse witness (Brief for Appellants at 11). Their claim has no merit.

Judge Cannella reached his decision in reliance upon the time-tested principle that if established by a fair preponderance of independent non-hearsay testimony that Carmen Caban and the appellants were co-conspirators, the testimony of Carmen Caban regarding hearsay statements of other co-conspirators will be admissible against them. See, e.g., *United States v. Wiley*, — F.2d — (No. 75-1082, 2d Cir., July 29, 1975); *United States v. D'Amato*, 493 F.2d 359, 363 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974); *United States v. Geaney*, 417 F.2d 1116, 1120

(2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970). Indeed, this Court has rejected, in an analogous context, the argument that co-conspirators' statements not specifically implicating a defendant are insignificant to a Sixth Amendment claim. *United States v. Tramunti*, 513 F.2d 1087, 1117 (2d Cir. 1975).

Appellants argue that it is "unlikely" that the Government witnesses will give any testimony which will implicate them (Brief for Appellants at 11). Such an argument is simply contradicted by the facts and the law and hardly rises to a showing that Judge Cannella abused his discretion in finding that Kassner & Detsky's former client was an important adverse witness. Absent such a showing, the Court's finding should not be upset. *Hull v. Celanese Corporation*, *supra*, 513 F.2d at 571. Moreover, in a question of disqualification of counsel, any doubt should be resolved in favor of disqualification. *Id.*

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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Attorney for the United States
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MICHAEL Q. CAREY,
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*Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
)
COUNTY OF NEW YORK) ss.:

MICHAEL Q. CAREY being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 25TH day of SEPTEMBER, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

*KASSNER & DETSKY
122 E. 42ND ST.
NEW YORK, NEW YORK 10017*

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Michael Q. Carey

Sworn to before me this

25TH day of September, 1975

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977

